

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**CC 10/08
CRC 13/08**

IN THE MATTER OF an application to extend time in which to
file a challenge

BETWEEN JOHNNY CORBETT
Applicant

AND NELSON PINE INDUSTRIES LIMITED
Respondent

Hearing: submissions received 20 and 27 June and 3 July 2008

Judgment: 4 August 2008

JUDGMENT OF JUDGE A A COUCH

[1] Mr Corbett was employed by Nelson Pine Industries Ltd until his dismissal on 12 September 2006. He alleged that he was unjustifiably disadvantaged prior to that date and that his dismissal was also unjustifiable.

[2] Those claims were investigated by the Authority which gave its determination on 9 April 2008 (CA 37/08), dismissing Mr Corbett's claims. Mr Corbett was dissatisfied with that determination and wishes to challenge it in the Court.

[3] Section 179 of the Employment Relations Act 2000 provides that a party to a determination of the Authority may challenge it as of right provided an election to do so is filed in the Court within 28 days after the date of the Authority's determination. In this case, that meant Mr Corbett had to file his election no later than 7 May 2008.

[4] Mr Corbett was represented in the Authority by Ms Angus Burney, a solicitor employed by his union. On 8 May 2008, Ms Angus Burney attempted to file an

election on behalf of Mr Corbett but discovered she was 1 day late. The following day, 9 May 2008, she filed the application now before the Court. That is described as an application for special leave to file a challenge out of time but, consistent with s219 of the Employment Relations Act 2000, I treat it as an application for extension of time. That application is opposed.

[5] Section 219 confers a general discretion to extend the time within which anything required or authorised by the Act may be validly done. The principles applicable to the exercise of that discretion are well established and were summarised in my decision in *An Employee v An Employer* [2007] ERNZ 295.

[6] In this case, the extent of the delay was 2 days. The delay was explained as being a miscalculation by Ms Angus Burney as counsel. It is not suggested that the delay has caused hardship to the respondent or to any other person. The only prejudice said to have occurred is that the respondent has lost the certainty of outcome it was otherwise entitled to have once the 28-day period prescribed by s179 had expired.

[7] An important factor to be taken into account in exercising the discretion under s219 is whether the proposed challenge has a realistic prospect of success. As I observed in *An Employee v An Employer*, that will usually require either an error of law or reasoning apparent in the determination itself or evidence which persuades the Court that it may reach a conclusion different to that of the Authority. In this case, it is not submitted that there is any error on the face of the determination and no evidence is provided suggesting why the Court should differ from the Authority's view of the matter. Mr Corbett simply seeks a rehearing of the matter.

[8] In determining this application, the overriding consideration must be whether the justice of the case requires that the extension of time sought be granted.

[9] In this case, the delay was minimal and the explanation for that delay is satisfactory. In particular, I am satisfied that the delay was not the result of Mr Corbett's inaction but rather an error by counsel. Equally, I am satisfied that an

extension of time would not cause hardship to any party. These all favour granting the application.

[10] Of the two factors mitigating against the application, I regard the prejudice to the respondent as minimal in this case. The lack of evidence establishing a real prospect of success of the proposed challenge, however, must carry significantly more weight.

[11] Overall, I find it is in the interests of justice to grant the application but I do so by a narrow margin. The lack of any basis to conclude that the proposed challenge has a real prospect of success must count seriously against the application and it is principally the fact that Mr Corbett was not responsible in any way for the delay which persuades me that he should not be deprived by that delay of the opportunity to pursue a challenge that would otherwise have been his right.

[12] The application is granted to extend time for filing an election until 7 days after the date of this judgment. Filing will only be complete upon payment of the required filing fee. Provided that is done within the 7-day period, the draft statement of claim provided to the Court on 9 May 2008 shall then become the statement of claim for the purposes of the challenge and must be served in the usual way. The respondent's obligation to file a statement of defence will then arise, also in the usual way.

[13] Costs relating to this application are reserved.

A A Couch
Judge

Judgment signed at 2.30pm on 4 August 2008